IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21906

TED DAVID HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

J. B. Tietz
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Appellant

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Table of Authorities

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21906

TED DAVID HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

Point I.

In our Opening Brief (p. 4) we showed that appellant made a claim for a dependency classification [Ex. 29], that he thereafter gave detailed evidence of this [Ex. 38], that the local board's reply was a form letter, rejecting his claim [Ex. 43], and that immediately thereafter he was sent an Order to Report for Induction SSS Form No. 252 [Ex. 44].

We pointed out, argumentatively, that no opportunity was given him, by the board's summary method of handling his new evidence, to secure either an Appearance Before Local Board or an administrative appellate determina-

tion. The rejection procedure used by his local board does not permit a request for an Appearance or an appeal [Ex. 11].

Appellee's Brief argues:

1. This issue was not raised until the appeal.

We answer: Rule 52(b) [F.R.Cr.P.] permits this Court to recognize plain error. Also, see *Chernekoff* v. *United States,* 9 Cir., 1955, 219 F. 2d 721.

Further, compare the reasoning in *People* v. *Wellborn,* 65 Cal. Rptr. 8 (Advance Sheets of February 5th), where an attorney's failure to present available defense was deemed a denial of due process.

2. "A registrant who believes he has been erroneously classified must exhaust all administrative remedies before his claim may be heard in the courts." (p. 10 of Appellee's Brief).

We answer: he had no administrative remedies to exhaust. A registrant cannot appeal from a refusal to reopen. See *Miller* v. *United States,* 9 Cir., 1967, No. 21417, decided December 29, 1967.

3. "No Due Process Rights of Appellant Were Violated by the Local Board's Refusal to Reopen Appellant's File After Reviewing His Dependency Claim," again arguing that since this wasn't raised at the trial it may not be considered by the Court.

On this point, however, appellee adds an argument not dealt with by us above: that *Miller* is distinguishable.

It is said on page 12, "the record indicated that the Board treated appellant's claim as a motion to reopen which was properly denied."

This is the very issue before the Court, namely, may new evidence be ignored?

Appellee goes on to argue the point by asserting that there was a basis in fact for deciding that the new claim lacked merit. The fallacy of applying this standard is pointed out by *Miller*: the local board could reject his claim but it may not deprive the registrant of an administrative appellate opportunity.

The argument of appellant, on this subject, concludes with the old bugaboos: "A registrant . . . could delay induction indefinitely" and "In short, conscription could be avoided by anyone who chooses to do so." If this were so the lawyers in this work would have learned it by this time and few, if any, would leave their offices for the time-consuming and less-lucrative court work.

Point II

In our Opening Brief (p. 10) we next argued that the trial court used an imported, already condemned standard for finding this appellant guilty.

We quoted a paragraph of the trial court's final comment and appellee quotes another, each to support our position.

What appellee quotes may absolve the court from error with respect to the conscientious objector claim of appel-

lant, but it doesn't touch the other, the new, dependency claim.

We submit that—

1. The new dependency claim should have been handled as this Court set forth in *Miller,* and

2. The paragraph we quoted from *Franks* v. *United States,* 9 Cir., 1954, 216 F. 2d 266 applies on our *final* point, the dependency point.

Respectfully,

J. B. Tietz
Attorney for Appellant

March 7, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz
Attorney for Appellant